



1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
Main: 202-296-8800
Fax: 202-296-8822
www.environmentalintegrity.org

July 2, 2020

Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via FOIAOnline

Re: Freedom of Information Act Request for Records in Correspondence Management System Related to EPA Policy and Guidance Between January 20, 2017 and July 2, 2020.

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 551 et seq., I am writing on behalf of the Environmental Integrity Project (EIP) to request records held by the Environmental Protection Agency (EPA).

RECORDS REQUESTED

EIP seeks three kinds of records related to the Agency's issuance of policy and guidance between January 20, 2017 and July 2, 2020.

First, EIP specifically requests records comprising all logs of information from EPA's Correspondence Management System containing correspondence meeting all three of the following criteria:

1. Related to EPA policy, EPA guidance, or an Executive Order;
2. Signed by the EPA Administrator or one or more of the EPA Assistant Administrators from the Office of Air and Radiation (OAR), Office of Chemical Safety and Pollution Prevention (OCSPP), Office of Enforcement and Compliance Assurance (OECA), Office of Land and Emergency Management (OLEM), or Office of Water (OW); and
3. Dated between January 20, 2017, and July 2, 2020.

The logs may be produced from the Correspondence Management System as a PDF, spreadsheet, screenshot, or any format that EPA typically uses to produce information from the Correspondence Management System.

Second, if EPA has already conducted reports from the Correspondence Management System meeting criteria 1 and 2 above, EIP requests that EPA provide such reports.

Third, if, to EPA's knowledge, there are any policy documents, guidance documents, or documents related to Executive Orders that are signed by the individuals in criterion 2 above, but not referenced in the requested records from the Correspondence Management System, EIP requests that EPA produce those documents.

CLAIMS OF EXEMPTION FROM DISCLOSURE

If you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them nevertheless. Should you elect to invoke an exemption, please provide the required full or partial denial letter and sufficient information to determine whether or not there may be grounds to appeal EPA's decision. In accordance with the minimum requirements and regulations of due process, this information should include:

- Basic factual material, including the originator, date, length, and addresses of the withheld items; and
- Explanations and justifications for denial, including the identification of the exemption applicable to the withheld information or portions of the information found to be subject to exemption, and how each exemption applies to the withheld material.

Additionally, should you elect to invoke an exemption for a record, please provide all reasonably non-exempt portions of such record that are not specifically exempted from disclosure.

If EPA estimates that the costs of completing this request will exceed \$100, please contact me with the estimated costs at your earliest convenience.

FEE WAIVER REQUEST

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), EIP requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this FOIA request be waived.

FOIA is intended to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA requires agencies to waive or reduce fees for requests "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

"[A]ll public interest groups...will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 29,696 (1986) (statement of Rep. English)). Congress intended the fee waiver

provision to be “liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 Cong. Rec. 27,190 (1986) (statement of Sen. Leahy)).

Fee waivers requests must be made with “reasonable specificity” and based on more than “conclusory allegations.” *Id.* (quoting *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Nat’l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987)). But FOIA does not require “pointless specificity.” *Id.* at 1314.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA’s implementing regulations because: (i) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government,” and (ii) disclosure of the information “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

EIP qualifies for the fee waiver because the requested information will “contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2). Specifically, EIP meets each of the four factors that EPA considers with respect to the “public understanding” prong.

A. The subject of the requested records concerns the operations or activities of the government, and the informative value of this information is high

Under factors (l)(2)(i) and (l)(2)(ii), EPA considers “**Whether the subject of the requested records concerns ‘the operations or activities of the government’**” and “**The informative value of the information to be disclosed.**” 40 C.F.R. § 2.107(l)(2)(i), (ii).

The subject of the records EIP has requested concerns the operations and activities of the government. EIP has requested records relating to the Agency’s actions issuing policy and guidance, which constitute “operations or activities of the government.” Thus, any records relating to such actions also concern “the operations or activities of the government.”

The informative value of this information is very high in several ways. First, the information will provide the public with a detailed and full scope of EPA’s use of policy, guidance, and other documents outside of actual rulemaking to direct and amend the goals, mission, and actions of EPA with respect to the environmental laws it administers. This is a topic EIP has followed since its inception as an organization, and it is vital that the public understand the role that these policies, guidance documents, and other non-rulemaking documents play in guiding the agency.

Second, the records produced from this request will provide the public with new factual information of a timely subject that has only recently been developing in the public understanding. On October 9, 2019, President Trump signed Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, requiring that agencies “make guidance documents readily available to the public,” wherein “guidance document” is defined as “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation” with some particular exceptions. 84 Fed. Reg. 55,235 (Oct. 15, 2019). Among other things, the Executive Order requires that each agency “establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.” *Id.* at 55,236.

While the original deadline set by the Office of Management and Budget (OMB) for establishing the searchable, indexed online database for all active guidance documents was February 28, 2020, EPA received an extension until July 10, 2020 to reach full compliance.¹ For this reason, the documents currently available through EPA’s online guidance portal do not constitute a guaranteed complete accounting of current Agency policy and guidance. Even once the Agency presumably meets the deadline for full compliance on July 10, 2020, the information EIP requests here will allow us—and the public—to confirm that the documents listed on the portal constitute a full and complete listing of EPA’s guidance and policy and provide an accurate picture of the Agency’s issuance of such documents.

B. Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities

Under factors (1)(2)(iii) and (1)(2)(iv), EPA considers “The contribution to an understanding of the subject by the public is likely to result from disclosure” and “The significance of the contribution to public understanding.” 40 C.F.R. § 2.107(1)(2)(iii), (iv).

As to factor (1)(2)(iii), considerations within this factor include the “requester’s expertise in the subject area and ability and intention to effectively convey information to the public” and that the public understanding in question be that of “a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” *Id.*

Comprised of former EPA enforcement attorneys, public interest lawyers, analysts, investigators, and community organizers, EIP frequently uses information it obtains through FOIA requests to analyze and simplify public information on environmental issues through the issuance of reports that are covered by media sources. EIP has a long, demonstrated, and continuing history of expertise and contribution to the public understanding on a number of topics pertaining to governmental operations. In furtherance of this, EIP distributes information via regularly published reports and press releases, its frequently updated website (<http://www.environmentalintegrity.org>) and social media platforms

¹ See Office of Mgmt. & Budget, Exec. Office of the President, M-20-02, Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (Oct. 31, 2019); EPA, *EPA Guidance Documents*, <https://www.epa.gov/guidance> (last accessed July 2, 2020).

(<https://twitter.com/EIPOnline>; <https://www.facebook.com/EnvIntegrity/>), communication with partner organizations and outside media outlets, and legal and administrative documents such as public comments on agency rulemakings and permits and briefs and documents filed in litigation. EIP intends to make the same dissemination in this instance. After reviewing the information provided in response to this FOIA request, EIP intends to use its resources and expertise to inform and educate the public, the media, and other nonprofit advocacy organizations as to EPA's issuance of policy and guidance from January 20, 2017 to July 2, 2020.

Some examples of these types of dissemination include the following:

- On August 10, 2017, EIP published a report entitled "Environmental Enforcement Under President Trump," in which it detailed the decline in EPA's civil enforcement actions and penalties under the Trump Administration in 2017 versus years past. EIP based the report on records obtained from EPA, comparing consent decrees lodged between January and July 2017 to similar periods in other administrations. EIP posted the report and a press release to its website and conducted a press conference to raise awareness of the report. See EIP, *Environmental Enforcement Under Trump* (2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/08/Enforcement-Report.pdf>; Press Release, EIP, *Civil Penalties Against Polluters Drop 60 Percent So Far Under Trump* (Aug. 10, 2017), <http://www.environmentalintegrity.org/news/penalties-drop-under-trump/>.
- EIP published a follow-up report on this subject on February 15, 2018, in which it analyzed a full year of information as to EPA's environmental enforcement under the leadership of Administrator Scott Pruitt. See EIP, *Paying Less to Pollute: A Year of Environmental Enforcement Under the Trump Administration* (2018), available at <http://www.environmentalintegrity.org/reports/paying-less-to-pollute/>.
- On December 7, 2017, EIP—on behalf of four partner nonprofit organizations in Texas and Louisiana—reviewed and provided public comments to the U.S. Department of Justice, in which EIP made an in-depth analysis of a consent decree between the United States and Exxon Mobil regarding Clean Air Act violations at the company's chemical plants. See Comments of EIP et al. to Assistant Attorney General, U.S. Department of Justice (Dec. 7, 2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/ExxonMobilCDAnalysis.pdf>. On December 12, 2017, EIP made these comments available to the general public by posting them to its website along with a press release summarizing the issues that EIP and its partner groups raised. See Press Release, EIP, *Trump Administration's Settlement with Exxon Mobil Appears to Require Less in Pollution Controls than Advertised* (Dec. 12, 2017), <http://www.environmentalintegrity.org/news/trump-administrations-settlement-with-exxon-mobil-appears-to-require-less-in-pollution-controls-than-advertised/>.
- On December 11, 2017, EIP published a report finding that while EPA's Total Maximum Daily Load for the Chesapeake Bay has reduced nitrogen and phosphorous pollution, the Bay may be receiving much more nitrogen pollution than previously thought via

“deposition” of ammonia released to the air. EIP based its analysis on EPA’s Total Maximum Daily Load for the Chesapeake Bay, the agency’s emissions factor for ammonia emissions from broiler chicken concentrated animal feeding operations (CAFOs), and monitoring data from the CAFOs. EIP posted the report to its website with an analysis summarizing the findings for the general public. *See* EIP, *Ammonia Emissions from Broiler Operations Higher than Previously Thought* (Dec. 2017), <http://www.environmentalintegrity.org/reports/ammonia-emissions/>.

- On July 7, 2017, EIP and its Texas partner organization Environment Texas issued a report entitled “Breakdowns in Enforcement,” in which the groups found that the State of Texas imposed penalties for a mere three percent of illegal air pollution releases between 2011 and 2016. *See* EIP & Env’t Texas, *Breakdowns in Enforcement: Texas Rarely Penalizes Industry for Illegal Air Pollution Released During Malfunctions and Maintenance* (July 2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Breakdowns-in-Enforcement-Report.pdf>. The groups based their analysis on data obtained from the Texas Commission on Environmental Quality. EIP made the report publicly available by posting it to its website with a press release and publicized it through a telephonic press conference, which is also available on the website. *See* Press Release, EIP, *Texas Fails to Penalize 97 Percent of Illegal Air Pollution Releases* (July 7, 2017), <http://www.environmentalintegrity.org/news/texas-fails-to-penalize-97-percent-of-illegal-air-pollution-releases/>.
- On December 4, 2017, EIP filed a lawsuit against EPA for its refusal to produce records regarding Administrator Scott Pruitt’s public speeches. *See* Press Release, EIP, *EPA Administrator Pruitt’s Secrecy Extends Even to Refusal to Release His Public Speeches* (Dec. 4, 2017), <http://www.environmentalintegrity.org/news/pruitts-public-speeches/>. EIP posted a copy of its complaint to its website, along with a press release in which EIP explained that such public speeches are typically available to the public via EPA’s website, but that EPA had recently broken from this tradition of transparency. EIP publicly listed the dates and locations of and organizations to which Administrator Pruitt delivered the speeches. *Id.*
- On May 11, 2017, EIP sent a letter to EPA’s Office of Inspector General, requesting that the Office investigate Administrator Pruitt’s reassignment of ten criminal enforcement agents to his security detail. *See* Letter from Eric Schaeffer, EIP, to Office of Inspector General, EPA (May 11, 2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/05/Letter-to-EPA-IG-from-EIP.pdf>. EIP based this letter on EPA budget documents that the Washington Post had obtained. EIP posted the letter to its website along with a press release in which it further publicized the EPA budget documents and their implications. *See* Press Release, EIP, *EIP Demands Investigation of EPA Administrator Scott Pruitt’s Huge Security Detail* (May 11, 2017), <http://www.environmentalintegrity.org/news/eip-demands-investigation-of-epa-administrator-pruitts-huge-security-detail/>.

As to factor (1)(2)(iv), this is a variation on factor (1)(2)(iii)—focusing on the significance of the contribution to public understanding rather than on the public understanding itself—and therefore necessarily involves consideration as to the requester’s dissemination and expertise. As a result, the information EIP has provided regarding factor (1)(2)(iii) as to EIP’s history and means of dissemination are applicable.

Additionally, it is clear from EIP’s research to date that there is no other way for the public to verify the currently incomplete listing on EPA’s website, other than with internal records. EIP intends to improve this public understanding by learning more from the information requested and subsequently making this information and EIP’s expert analysis of the information available to the public.

II. Obtaining the information is of no commercial interest to EIP

As to FOIA’s second prong for fee waivers—disclosure of the information “is not primarily in the commercial interest of the requester”—EPA regulations set out two factors for the agency to consider. 40 C.F.R. § 2.107(l)(3). EIP clearly meets both of these factors.

As to factor (1)(3)(i), EPA considers **“Whether the requester has a commercial interest that would be furthered by the requested disclosure.”** 40 C.F.R. § 2.107(l)(3)(i). As a 501(c)(3) non-profit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

Under factor (1)(3)(ii), EPA considers the requester’s primary interest in the disclosure: **“Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’”** 40 C.F.R. § 2.107(l)(3)(ii). EIP’s primary interest is a public interest: in analyzing and assessing EPA’s issuance of policy and guidance from January 20, 2017 to July 2, 2020. Furthermore, it is clear from EIP’s explanation as to the public understanding factors that there is a great deal of public interest in obtaining, analyzing, and disseminating this information.

III. Conclusion

For the reasons set out in EIP’s FOIA request and this fee waiver request, EIP has clearly met FOIA’s requirements as to fee waivers and the six factors EPA has set out to consider these requirements. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). EIP is therefore entitled to a waiver of fees for its FOIA request and respectfully requests that EPA grant such a waiver.

OPPORTUNITY TO PROVIDE CLARIFICATION

If I can provide any additional information or answer any questions that can help to clarify or limit this request, please do not hesitate to contact me at (202) 263-4451 or akron@environmentalintegrity.org. Thank you for your assistance with this request.

Sincerely,

Adam Kron
Senior Attorney
Environmental Integrity Project